86-138

Supreme Court, U.S.
FILED
JUL 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1986

NATIONAL COMMUNICATION SYSTEMS, INC., A Michigan Corporation; VICTOR E. SHAPLEY,

*Petitioners,*

versus

MICHIGAN PUBLIC SERVICE COMMISSION, A Commission of the State of Michigan; ERIC J. SCHNEIDEWIND; DANIEL DEMLOW; ROBERT FISCHER and GERALD IRWIN,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*– AND APPENDIX –*

VAN BENSCHOTEN, HURLBURT & TSIROS, P.C.
By: MAURICE L. VAN BENSCHOTEN, Esq.
*Counsel of Record*
LAWRENCE A. HURLBURT, Esq.
*Counsel for Petitioners*
821 S. Michigan Avenue
P.O. Box 3236
Saginaw, Michigan 48605
(517) 790-3221

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

## QUESTIONS PRESENTED

### I.

ARE THIS COURT'S DECISIONS IN *PARRATT* v. *TAYLOR*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), AND *HUDSON* v. *PALMER*, 468 U.S. __, 104 S.Ct. __, 82 L.Ed.2d 383 (1984), HOLDING THAT A RANDOM AND UNAUTHORIZED NEGLIGENT OR INTENTIONAL DEPRIVATION OF PROPERTY BY A STATE EMPLOYEE DOES NOT CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IF A MEANINGFUL STATE POSTDEPRIVATION REMEDY FOR THE LOSS IS AVAILABLE, APPLICABLE WHEN STATE EMPLOYEES CONSPIRE OVER AN EXTENDED PERIOD OF TIME WITH THE INTENT TO MALICIOUSLY ABUSE THEIR GOVERNMENT POWER FOR THE PURPOSE OF DESTROYING AN INDIVIDUAL'S PROPERTY?

### II.

DOES THE *PARRATT/HUDSON* RULE APPLY TO CONSPIRATORIAL, AS OPPOSED TO RANDOM AND UNAUTHORIZED ACTS OF MISCONDUCT BY GOVERNMENT OFFICERS AND EMPLOYEES, WHERE THE WRONGDOERS THEMSELVES ARE IN A POSITION TO AFFORD THE VICTIM OF THEIR CONSPIRACY DUE PROCESS OF LAW?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | v |
| PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT | 1 |
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. THE COURT OF APPEALS ERRED IN DISMISSING APPELLANTS' DUE PROCESS CLAIMS AGAINST APPELLEES ON THE GROUND THAT THESE CLAIMS WERE BARRED BY *PARRATT* v. *TAYLOR*, *HUDSON* v. *PALMER*, AND *VICORY* v. *WALTON*. | 7 |
| A. The *Parratt/Hudson/Vicory* Rule Does Not Apply To Those Due Process Violations/ Deprivations Which Rise To The Level Of "Constitutional Torts." | 7 |
| B. The *Parratt/Hudson* Rule Does Not Apply To Conspiratorial, As Opposed To Random And Unauthorized Acts Of Misconduct By Government Officers And Employees, Where The Wrongdoers Themselves Are In A Position To Afford The Victim Of Their Conspiracy Due Process Of Law. | 13 |
| CONCLUSION | 17 |

Page

APPENDIX TO PETITION FOR CERTIORARI:

*Appendix A* – Opinion – United States Court of Appeals for the Sixth Circuit . . . . A-1

*Appendix B* – Order Granting Defendants' Motion to Dismiss, and Judgment – United States District Court for the Eastern District of Michigan, Northern Division . . . . . B-1

*Appendix C* – Complaint – United States District Court for the Eastern District of Michigan, Northern Division . . . . C-1

## TABLE OF AUTHORITIES

Page

**CASES:**

*Augustine* v. *Doe*, 740 F.2d 322 (5th Cir., 1984) 14-15

*Baker* v. *McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) . . . . . 12

*Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) . . . . . 5

*Daniels* v. *Williams*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 622 (1986) . . . . . 8, 9, 10

*Davidson* v. *Cannon*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 677 (1986) . . . . . 8, 9, 10

*Delahoussaye* v. *Seale*, 605 F.Supp. 1525 (W.D. Louisiana, 1985) . . . . . 11

*Hudson* v. *Palmer*, 468 U.S. __, 104 S.Ct. __, 82 L.Ed.2d 393 (1984) . . . . . i, 7, 8, 12, 13

*Hughes* v. *Roe*, 449 U.S. 5 (1980) . . . . . 10

*Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1980, 68 L.Ed.2d 420 (1981) . . . . . i, 7, 9, 13, 14

*Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 113 (1952) . . . . . 7

*Rymer* v. *Douglas County*, 764 F.2d 796 (11th Cir., 1985) . . . . . 10, 11

*Vasquez* v. *City of Hamtramck*, 757 F.2d 771 (6th Cir., 1985) . . . . . 11, 12

*Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir., 1983) . . 7

*Wilson* v. *Beebe*, 743 F.2d 342 (6th Cir., 1984) . . . 11

**STATUTES:**

42 U.S.C. § 1254(1) . . . . . 1

42 U.S.C. § 1983 . . . . . 2, 4, 7, 8

Page

UNITED STATES CONSTITUTION:

Fourteenth Amendment . . . . . 2

MISCELLANEOUS:

MCR 3.306 . . . . . 16

Michigan Administrative Code (1979), Rule R 460.31 . . . . . 15

No. _____

In The

# Supreme Court of the United States

October Term, 1986

NATIONAL COMMUNICATION SYSTEMS, INC., A Michigan Corporation; VICTOR E. SHAPLEY,

*Petitioners,*

versus

MICHIGAN PUBLIC SERVICE COMMISSION, A Commission of the State of Michigan; ERIC J. SCHNEIDEWIND; DANIEL DEMLOW; ROBERT FISCHER and GERALD IRWIN,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit decided and filed April 25, 1986.

### OPINION BELOW

The opinion of the Court of Appeals decided and filed on April 25, 1986 (Appendix A), is reported at 789 F.2d 370 (6th Cir., 1986).

### JURISDICTION

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit is founded upon 42 U.S.C. § 1254(1).

The opinion of the Court of Appeals (Appendix A), was decided and filed April 25, 1986. A Petition for Rehearing was not filed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment XIV, Section One, provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Act of 1871, 42 U.S.C. Section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF THE CASE

This is an action arising under § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.

In March of 1975, Appellant Shapley and the former owner of two small Michigan telephone companies, Mesick Telephone Company and Northern Telephone Company, Mr. James R. Hoogesteger, entered into an agreement whereby Appellant National Communications Systems, Inc. (hereinafter referred to as "Appellant NCSI"), was formed as a Michigan corporation, and acquired, as a holding company, all of the stock and assets of Mesick and Northern.

Appellant NCSI, in order to provide reasonable and satisfactory service to the customers of Mesick and Northern, undertook the planning, financing and construction of capital improvements in the geographical area served by Northern Telephone Co., and Mesick Telephone Co.

On September 30, 1976, Northern Telephone Co., in accordance with the rules and procedures of the Michigan Public Service Commission (hereinafter referred to as "MPSC"), filed a request for approval of the borrowing of funds to finance the improvements. On February 2, 1977, Northern Telephone Co. filed a second petition with the MPSC for approval of a $47,000.00 rate increase to its consumers.

Thereafter Northern Telephone Co., and Appellant Shapley were the victims of maliciously motivated abuse of the regulatory process with the intended result of destroying Appellants' property and business.

Specifically, Appellees, past and present members of the MPSC, intentionally and maliciously delayed action on Appellants' petitions for unreasonable lengths of time, without regulatory justification. Forty-three months elapsed from the time Northern Telephone Co. filed its petitions to the time the MPSC issued an Order.

Additionally, Appellees fired a MPSC auditor when the auditor, at Appellees' request, would not falsify his calculations in order to defeat Appellants' request for a rate increase. Appellees thereafter appointed an independent appraiser to determine the value of Appellants' property and facilities, a value used as a factor in the rate setting process. As was done to the discharged MPSC auditor, Appellees also harassed the independent appraiser to the point of causing him to substantially understate the value of Appellants' property and facilities.

Moreover, Appellees intentionally and maliciously caused the disruption of telephone service to Appellants' customers by physically destroying Appellants' lines and other equipment, and then aggressively solicited public criticism and complaints from Appellants' customers about Appellants' telephone services.

Lastly, Appellees intentionally and maliciously caused Appellants' costs and expenses incurred in the regulatory proceeding to be unjustifiably increased to more than $200,000.00 for the purpose of destroying Appellants' ability to provide telephone service to its customers.

Appellants have claimed that Appellees, under color of law, abused the regulatory power entrusted to them for the purpose of destroying Appellants' property. By virtue of Appellees' abusive conduct, Appellants further claim that the Appellees' conduct caused both Appellant NCSI and Appellant Shapley to be subjected to the deprivation of rights secured to them by the 14th Amendment to the Constitution, in violation of 42 U.S.C. § 1983. Particularly, Appellees Demlow and Schneidewind established, through the power and authority vested in them as commissioners of the MPSC, a policy of destroying small telephone companies, including Appellants.

In the District Court, in lieu of filing an Answer to Appellants' Complaint, Appellees filed a Motion to Dis-

miss pursuant to F.R.Civ.P. 12(b)(1), on the ground that the District Court lacked subject matter jurisdiction on the cause asserted and that the Complaint failed to state a claim upon which relief could be granted.

At the time of hearing on the Motion to Dismiss, Appellees argued essentially three points: (1) that Appellants' action was a claim of damages against the State of Michigan and was, therefore, barred by the Eleventh Amendment; (2) that Appellants' action was barred because of their failure to exhaust, through appeal, the procedures available to them administratively under State law; and (3) that venue of the action was improperly laid in the Eastern District of Michigan.

Appellants asserted in response that the individual Appellees, sued in their individual capacity, are "persons" within the meaning of 42 U.S.C. § 1983, and are individually responsible for their malicious acts, in violation of the Civil Rights Act; that their action was not barred because of their failure to resort to State remedies; and that venue was properly laid in the Eastern District of Michigan. The District Court, *sua sponte*, raised the issue of abstention under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and determined that the case should be dismissed on this ground.

The District Court entered an "Order Granting Defendants' Motion to Dismiss, and Judgment," stating in pertinent part:

> "IT IS ORDERED that the claims against the Michigan Public Service Commission and the individual defendants in their official capacities is DISMISSED as required by the Eleventh Amendment.
>
> "For reasons stated on the record in open court, IT IS ORDERED that the due process claims against

> the individual defendants in their individual capacities are DISMISSED as required by *Parratt* v. *Taylor*, 451 US 527 (1981); *Hudson* v. *Palmer*, __ US __, 104 S Ct 3194 (1984), and *Lee* v. *Western Reserve Psychiatric Habilitation Center*, No. 83-3421 (6th Cir 1984).
>
> "For reasons stated on the record in open court, IT IS ORDERED that all remaining claims are DISMISSED as required by *Burford* v. *Sun Oil Co.*, 319 US 315 (1943) and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 US 100 (1981)."

On April 25, 1986, the Court of Appeals for the Sixth Circuit affirmed the District Court's opinion (Appendix A).

The Court of Appeals held that Appellants failed to plead the inadequacy of state processes. Additionally, in regard to Appellants' equal protection claim brought under § 1985(3), the Court of Appeals, recognizing that the District Court did not specifically address this claim, nevertheless affirmed dismissal of the claim on the premise that review of the record indicates that this claim will not lie. The Court of Appeals reasoned that "small telephone companies are not members of a discrete and insular minority of the sort that has traditionally received special protection under the suspect classification analysis of the fourteenth amendment" (Appendix A).

Appellants have not filed a Petition for Rehearing.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is inconsistent with accepted precedents of this Court. Likewise, the opinions of other lower federal courts have not been followed.

The Court of Appeals' decision, contrary to precedent and the intent of Congress, eliminates a person's right to file a substantive ("constitutional tort") claim in federal court, pursuant to 42 U.S.C. § 1983, instead forcing the person to file in state court.

## I.

## THE COURT OF APPEALS ERRED IN DISMISSING APPELLANTS' DUE PROCESS CLAIMS AGAINST APPELLEES ON THE GROUND THAT THESE CLAIMS WERE BARRED BY *PARRATT* v. *TAYLOR, HUDSON* v. *PALMER*, AND *VICORY* v. *WALTON*.

The Court of Appeals in its opinion categorized the instant action as "simply a Section 1983 suit for deprivation of property without *procedural* due process" (Appendix A). (Emphasis added) Relying on the rule adopted by this Court in *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), as expanded by *Hudson* v. *Palmer*, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 393 (1984), in conjunction with *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir., 1983), the Court of Appeals ruled, *inter alia*, that, "Plaintiffs failed to plead the inadequacy of state process," (Appendix A). The Court of Appeals therefore dismissed Appellants' suit.

### A. The *Parratt/Hudson/Vicory* Rule Does Not Apply To Those Due Process Violations/Deprivations Which Rise To The Level Of "Constitutional Torts."

This Court has long recognized that a 42 U.S.C. Sec. 1983 action alleges a *substantive* due process violation if the state actor's conduct is "abhorrent" or "shocks the conscience" of the Court. *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 113 (1952). If the state actor's tortious conduct is "abhorrent," "shocks the conscience," or is an "abuse of power," the tortious conduct

rises to the level of a constitutional tort, and a § 1983 action may be brought in federal court notwithstanding the availability of state tort remedies. *Daniels* v. *Williams*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 622 (1986); *Davidson* v. *Cannon*, 474 U.S. __, 106 S.Ct. __, 88 L.Ed.2d 677 (1986). The Court of Appeals' decision is a significant departure from these cases.

Appellants believe that the *Hudson, supra,* Court, in dictum, makes a distinction between "intentional" deprivation and an abhorrent abuse of governmental power, recognizing that Hudson's conduct could not be categorized as an abhorrent abuse of governmental power. As was stated:

> "The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent."
>
> 82 L.Ed.2d at 407.

Appellants submit that a state actor who abhorrently intends to abuse his governmental power, such as Appellees in the case at bar, will not take affirmative steps to avoid signaling his intent, but will: (1) overtly prolong the state procedural process in order to effectuate the destruction of property belonging to another (Appendix C); (2) overtly discharge an employee because the employee refused to participate in a conspiracy to destroy property belonging to another (Appendix C); and (3) overtly disrupt the service that an individual provides to his customers in order to create a basis in

which that individual's customers might then substantively allege poor quality of service (Appendix C).

In *Daniels, supra,* this Court granted *certiorari* to provide guidance to lower courts in determining when tortious conduct by state officials rises to the level of a constitutional tort.

Justice Rehnquist, in the *Daniels* opinion, recognized and adopted Justice Powell's *Parratt, supra,* concurring opinion, noting:

> ". . . not only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no *affirmative abuse of power.*'" (Emphasis added)
>
> 88 L.Ed.2d at 667.

The *Daniels* opinion made clear that the Due Process Clause requires the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property . . .",

> "And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., *Rochin, supra,* it serves to prevent governmental power from being 'used for purposes of oppression, . . .'"
>
> 88 L.Ed.2d at 668.

Contrary to the Supreme Court's decisions in *Daniels, supra,* and *Davidson, supra,* the Sixth Circuit Court of Appeals failed to consider the affirmative acts of misconduct alleged in ¶¶ 17, 18 and 20 of Appellants' Complaint (Appendix C). As noted in these paragraphs of the Complaint, Appellees affirmatively abused the power of their office, including the following acts as set forth in the Complaint:

(1) they intentionally delayed action on Appellants' petitions, for unreasonable lengths of time;

(2) they fired a Michigan Public Service Commission auditor when the auditor, at Appellees' request, would not falsify his calculations in order to defeat Appellants' request for a rate increase;

(3) they replaced the discharged auditor with an independent appraiser and thereafter harassed the independent appraiser to the point of causing the appraiser to substantially understate the value of Appellants' property and facilities;

(4) they intentionally caused the disruption of telephone service to Appellants' customers by physically destroying Appellants' telephone lines and other equipment, and then aggressively solicited public criticism and complaints from Appellants' customers about Appellants' services, and

(5) they intentionally caused Appellants costs and expenses incurred in the regulatory proceeding to be unjustifiably increased for the purpose of destroying Appellants' ability to provide telephone service to its customers.

Accepting the allegations in Appellants' Complaint as true, *Hughes* v. *Roe*, 449 U.S. 5, 10 (1980); *Rymer* v. *Douglas County*, 764 F.2d 796 (11th Cir., 1985), Appellees affirmatively abused their governmental power, and used their governmental power as an instrument of oppression. *Daniels, supra*, 88 L.Ed.2d at 667 and 668. Indeed, Appellees' conduct approached "the sort of abusive government conduct that the Due Process Clause was designed to prevent." *Davidson, supra*, 88 L.Ed. at 682. Under the circumstances, Appellants submit that the Court of Appeals erred in failing to consider the

*substantive* abuse of powers which were here used for the purpose of destroying Appellants' property.

The Sixth Circuit Court of Appeals, in determining whether a state actor's tortious conduct rises to the level of a constitutional tort, has adopted the standard of whether the state actor's conduct "shocks the conscience." *Wilson* v. *Beebe*, 743 F.2d 342 (6th Cir., 1984). (See also *Rymer, supra*, wherein the Eleventh Circuit Court of Appeals applied the standard of "abuse of government power"; *Delahoussaye* v. *Seale*, 605 F.Supp. 1525 (W.D. Louisiana, 1985), wherein the District Court considered both the "conscience shocking" and "excessively abusive conduct which is inherently impermissible.") Although *Wilson, supra*, involved an issue of deprivation of a life or liberty interest, whereas the instant case involves an issue of deprivation of a property interest, the Sixth Circuit has applied the above standard to cases involving a deprivation of property interest. See, e.g., *Vasquez* v. *City of Hamtramck*, 757 F.2d 771 (6th Cir., 1985).

In *Vasquez, supra*, plaintiff brought a § 1983 action alleging a conspiracy, involving a Hamtramck, Michigan police officer, to maliciously prosecute plaintiff by issuing parking tickets.

Plaintiff there claimed that he was involved in an altercation in Detroit with appellee Schneider, a Detroit hospital security guard. Schneider worked at the hospital with appellee Misiak, who was a City of Hamtramck police officer as well as a part-time hospital security guard. Vasquez alleged that Schneider told Misiak the license plate number of Vasquez' car and that Misiak maliciously and without probable cause wrote and filed two tickets for the illegal parking of Vasquez' car in Hamtramck. Vasquez claimed that he had never been in Hamtramck.

The *Vasquez* court explained that since the parking tickets are civil infractions which are punishable by fine only, Vasquez' potential loss was limited to the monetary loss and inconvenience of contesting the tickets. Accordingly, the deprivation was recognized as a property deprivation. *Id.* at 773. The Court of Appeals dismissed Vasquez' suit pursuant to *Parratt, supra, Hudson, supra,* and *Baker* v. *McCollan,* 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 443 (1979).

In dictum, the *Vasquez* court, however, did state:

> "The only possible remaining constitutional claim Vasquez could make here is that appellees' actions were so egregious as to violate substantive due process. This claim is without merit. While appellees' alleged conduct was reprehensible, it was not that type of conduct which so 'shocks the conscience' that it violates appellant's substantive due process rights. *See Rochin* v. *California,* 342 U.S. 165, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). A citizen does not suffer a constitutional deprivation every time he is subject to the petty harrassment of a state agent."
>
> *Id.* at 773.

A review, and liberal construction of Appellants' Complaint[1] (Appendix C) in the present case, shows that Appellants have alleged more than "a petty harrassment" by Appellees, and, in fact, have alleged a conscience-shocking abuse of governmental power.

---

[1] *Hudson, supra,* citing *Boag* v. *MacDougall,* 454 U.S. 354, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); *Haines* v. *Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

### B. The *Parratt/Hudson* Rule Does Not Apply To Conspiratorial, As Opposed To Random And Unauthorized Acts Of Misconduct By Government Officers And Employees, Where The Wrongdoers Themselves Are In A Position To Afford The Victim Of Their Conspiracy Due Process Of Law.

The rationale underlying the Supreme Court decisions in both *Parratt* and *Hudson* is that negligent and intentional deprivations of property are not actionable as Fourteenth Amendment violations because: (1) the State cannot reasonably be expected to foresee random and unauthorized acts of misconduct, and, therefore, it is impracticable to provide a predeprivation hearing with regard to the failure of state employees to follow established state procedures; and (2) if, in fact, the state does provide a meaningful postdeprivation remedy for the wrong committed, there is no violation of the Fourteenth Amendment because an appropriate and constitutionally sufficient vehicle to afford procedural due process is provided. The issue presented in the present case is whether Appellants have alleged an actionable violation of the Fourteenth Amendment. Appellants submit that, because of the circumstances giving rise to their cause of action, Appellees are estopped from relying on the rule of *Parratt* and *Hudson* for the following reasons:

(1) The misconduct alleged in Appellants' Complaint was neither random nor, by reason of the authoritative position held by each Appellee, unauthorized. Thus, the Complaint, in ¶¶ 20 and 21 (Appendix C) alleges:

> "(20) The defendants did each and severally combine and conspire with each other and with other unnamed persons, under color of law, to deprive Plaintiffs of rights guaranteed to

them by the Constitution and law of the United States, contrary to 42 USCA § 1985(3).

"(21) The acts and omissions of Defendants as hereinabove set forth constitute a conspiracy for the purpose of depriving directly or indirectly the Plaintiffs of the constitutionally guaranteed right of equal protection of the laws and due process of law and for the purpose of preventing duly constituted state authorities from securing to the Plaintiffs equal protection of the laws and due process of law, contrary to 42 USCA § 1985(3)."

The misconduct alleged in the Complaint (Appendix C) was neither random nor unauthorized; rather, it was part and parcel of a concealed (see Complaint, ¶ 22, Appendix C) plan and agreement between the Appellees to deprive National Communications and Mr. Shapley of their property without due process of law.

(2) Appellees, in their positions as Commissioners of the Michigan Public Service Commission (i.e., Appellees Schneidewind and Demlow) and as officers of the Commission staff (i.e., Appellees Fischer and Irwin) were each in a position, but for their agreement and conspiracy to act otherwise, to afford Appellants a predeprivation hearing "at a meaningful time and in a meaningful manner," *Parratt, supra,* 68 L.Ed.2d at 432. Accord, *Augustine* v. *Doe,* 740 F.2d 322 (5th Cir., 1984).

In *Augustine, supra,* the court, citing *Hudson, supra,* explained that the "controlling question" in determining the applicability of *Parratt* is "whether the State is in a position to provide for predeprivation process." *Id.* at 327. The *Augustine* court additionally stated:

"If, however, the state is able to provide the affected individual with a hearing before the deprivation

> occurs, due process usually requires that the state do so . . . . The availability of a postdeprivation tort remedy does not satisfy the requirements of due process in such cases . . . ."
>
> *Id.* at 328.

If the Appellees, for a lawful or unlawful reason, believed that Appellants' telephone companies were not being properly operated in the public interest, the rules of the Commission provide for a complaint and hearing procedure which may be invoked by any person or by the Commission on its own motion. Rule R 460.31 of the Michigan Administrative Code (1979) provides as follows:

> "(1) A complaint shall be limited to matters involving alleged unlawful or unreasonable acts, practices or omissions of a utility or carrier. A complaint may be either formal or informal and may be made by a person having good or sufficient reason therefor or by the commission on its own motion.
>
> "(2) An informal complaint shall be in writing and signed by complainant, and contain a concise statement of the facts involved and the name and address of the complainant and the party complained against. The commission will attempt to settle problems arising under an informal complaint without formal action when possible."

Moreover, under the Michigan General Court Rules in effect at the time of the occurrences at issue in this case, each Appellee was authorized to apply to the Michigan Attorney General to bring an action of *quo warranto* against Appellants for forfeiture of their charter, and, upon failure of the Attorney General to act, each Appellee was likewise authorized to apply to the appro-

priate circuit court to bring the action themselves. See GCR 1963, 715 (as replaced by MCR 3.306). (A quo warranto was filed against Appellants, however, two weeks after the MPSC issued its Order concerning Appellants' petitions for finance and rate increase.) In short, meaningful and timely predeprivation process was available to the individual Appellees in the present case, and resort to such process was entirely within the scope of the authority vested them by the statutes, regulations and General Court Rules of Michigan. Appellees chose instead to engage privately in a conspiracy to take Appellants' property.

In light of the facts alleged in the Complaint (Appendix C), it is Appellants' position that the individual Appellees now before the Court are estopped to assert that their acts did not constitute a violation of the Fourteenth Amendment. The intentional acts alleged in the Complaint (Appendix C) occurred over an extended period of time and were neither random nor, considering the official and employees involved, unauthorized. Appellants, therefore, submit that the Court of Appeals erred in dismissing their due process claims against the individual Appellees, since the principal justification underlying the *Parratt/Hudson* rule has no application to the facts of this case.

## CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

VAN BENSCHOTEN, HURLBURT & TSIROS, P.C.

By: /s/ MAURICE L. VAN BENSCHOTEN, Esq.
*Counsel of Record*

LAWRENCE A. HURLBURT, Esq.
*Counsel for Petitioners*

821 S. Michigan Avenue
P. O. Box 3236
Saginaw, Michigan 48605
(517) 790-3221

Dated: July 21, 1986

# APPENDIX TO PETITION FOR CERTIORARI

• • •

## APPENDIX A

### OPINION

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
*See Sixth Circuit Rule 24*

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed April 25, 1986)

(NATIONAL COMMUNICATION SYSTEMS, INC., A Michigan Corporation; VICTOR E. SHAPLEY, Plaintiffs-Appellants, v. MICHIGAN PUBLIC SERVICE COMMISSION, a Commission of the State of Michigan; ERIC J. SCHNEIDEWIND; DANIEL DEMLOW; ROBERT FISCHER and GERALD IRWIN, Defendants-Appellees — ON APPEAL from the United States District Court for the Eastern District of Michigan; Docket No. 85-1159)

Before: MERRITT and WELLFORD, Circuit Judges; and PECK, Senior Circuit Judge.

MERRITT, Circuit Judge.

Plaintiffs-appellants Victor E. Shapley and National Communications Systems, Inc. appeal the District Court's order dismissing their civil rights action. We affirm.

*I.*

In March, 1975, plaintiff Shapley formed plaintiff National Communications [*sic*] Systems, Inc. as a Michigan corporation. Shapley entered into an agreement with the owner of Mesick and Northern Telephone com-

panies, two small telephone companies operating in Michigan, under which National acquired as a holding company all the stock of the two telephone companies. The telephone companies needed a substantial financial investment in their facilities, so National undertook certain capital improvements.

On September 30, 1976, Northern Telephone Company filed a request for the Michigan Public Service Commission's approval of the borrowing of funds to finance the improvements. On February 2, 1977, Northern Telephone Company filed a second petition with the Michigan Public Service Commission, this time seeking approval of a $47,000 annual rate increase.

Plaintiffs allege that thereafter, Northern Telephone Company and Shapley were subjected to maliciously motivated abuse of the regulatory process by defendants-appellees, members of the Michigan Public Service Commission and the Commission itself, with the intended result of destroying plaintiffs' property and business. According to plaintiffs' complaint, defendants intentionally delayed action on plaintiffs' petitions for unreasonable lengths of time without regulatory justification. Additionally, defendants allegedly asked the commission's auditor to falsify his calculations in order to defeat plaintiffs' request for a rate increase. When the auditor refused, defendants fired him. Defendants then appointed an independent appraiser to determine the value of plaintiffs' property and facilities, a value used as a factor in the rate setting process. Defendants allegedly harassed the appraiser and constrained him to substantially understate the value. Moreover, plaintiffs allege, defendants intentionally caused the disruption of telephone service to plaintiffs' customers by physically destroying plaintiffs' lines and other equipment and then aggressively solicited public criticism and complaints from plaintiffs' customers

about plaintiffs' telephone service. Finally, plaintiffs allege that defendants intentionally caused plaintiffs' costs and expenses incurred in the regulatory proceeding to be unjustifiably increased to more than $200,000 for the purpose of destroying plaintiffs' ability to provide telephone service to their customers.

*II.*

On May 4, 1984, plaintiffs filed this action under 42 U.S.C. § 1983, alleging that defendants had, under color of state law, deprived plaintiffs of their property without due process of law, and under section 1985(3), alleging that defendants had conspired to deprive plaintiffs of equal protection and due process. The named defendants in the suit are the Michigan Public Service Commission and four present and past members of the commission. By this suit, plaintiffs sought $5,000,000 in damages. Defendants moved to dismiss the complaint under rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief could be granted. After a hearing on the motion, the District Court granted the motion in part.

The District Court ruled that the eleventh amendment barred the plaintiffs' action against the Michigan Public Service Commission and against the commissioners in their official capacities. The District Court judge further ruled that if plaintiffs' action against the commissioners attempted to reach them in their individual capacities, the due process claim should be dismissed as required by *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 104 S.Ct. 3194 (1984). Lastly, the judge determined, *sua sponte*, that he should abstain from exercising jurisdiction over this action and dismissed any remaining claims under *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981).

*III.*

At oral argument plaintiffs' counsel admitted that the District Court properly dismissed the claims against the Michigan Public Service Commission and any claims against the commissioners in their official capacity. Plaintiffs do not appeal the District Court's order in this respect, and we therefore state no opinion on the eleventh amendment issue.

*IV.*

Plaintiffs' appeal centers mainly around the District Court's dismissal of their individual-capacity § 1983 claim against the commissioners alleging the deprivation of a property interest without procedural due process. Plaintiffs do not allege a taking under the fifth amendment, a seizure of property under the fourth amendment, or any other claim incorporated by the fourteenth amendment's due process clause. This then is simply a § 1983 damage suit for deprivation of property without procedural due process. In *Vicory* v. *Walton*, 721 F.2d 1062 (6th Cir. 1983), *cert. denied*, 105 S.Ct. 125 (1984), this Court dealt with another such suit and held:

> in section 1983 damage suits for deprivation of property without procedural due process the plaintiff has the burden of pleading and proving the inadequacy of state processes, including state damage remedies to redress the claimed wrong.

721 F.2d at 1063. This requirement was imposed under the authority of *Parratt* v. *Taylor, supra*, and the Supreme Court applied a similar requirement a year after *Vicory* in *Hudson* v. *Palmer, supra*.

Plaintiffs failed to plead the inadequacy of state processes. On appeal they advance two arguments relevant to this point. First, plaintiffs argue that the requirement

of showing the inadequacy of state remedies, which grew out of *Parratt*, applies only to deprivations caused by random and unauthorized acts of misconduct, as opposed to the alleged conspiratorial acts involved in the case at bar where the alleged conspirators are the public officials whose duty it was to see that plaintiffs were not denied due process. Plaintiffs advance no authority for this contention. In *Vicory* the Court rebuffed a similar attempt to distinguish *Parratt*.

> As we read *Parratt*, the principle being applied does not turn on the question of whether the claimed constitutional tort affecting property is caused by intentional conduct or negligent conduct[1] or is based on strict liability. Nor does it matter whether the writ at common law would be in detinue (action for wrongful detention of a chattel by a bailor), trespass *de bonis asportatis* (action for carrying away plaintiff's chattels), trespass on the case (roughly speaking, an action for negligence) or a motion in a criminal case for return of property held as evidence. The reasoning of *Parratt* appears to extend at least to all section 1983 cases claiming a procedural due process injury to a property interest . . . .[2]

721 F.2d at 1065.

Plaintiffs next argue that any existing state law remedies are per se inadequate because state law clothes the commissioners in absolute immunity from liability in a suit for

---

[1] The Supreme Court recently closed the possibility of a § 1983 procedural due process case based on negligent conduct. *Daniels* v. *Williams*, 106 S.Ct. 662 (1986); *Davidson* v. *Cannon*, 106 S.Ct. 668 (1986).

[2] This requirement has also been extended to § 1983 procedural due process cases involving liberty interests. *Wilson* v. *Beebe*, 770 F.2d 578 (6th Cir. 1985) (en banc); cases cited *supra* note 1 (apparently extending this requirement *sub silentio*).

damages based on the commissioners' official conduct. In *Hudson* v. *Palmer*, the Supreme Court dealt with a similar contention. The Court examined state law on the immunity question and determined that the defendant would not be entitled to sovereign immunity. 104 S.Ct. at 3205. The Supreme Court of Michigan recently addressed the sovereign immunity issue in some detail. *Ross* v. *Consumers Power Co.*, 420 Mich 567, 363 N.W.2d 641 (1984). In regard to the question of immunity of government officials, the court held:

> We therefore hold that judges, legislators, and the highest executive officials of all levels of government are absolutely immune from all tort liability whenever they are acting within their judicial, legislative, or executive authority. Lower level officials, employees, and agents are immune from tort liability only when they are
>
> 1) acting during the course of their employment and acting, or reasonably believe they are acting, within the scope of their authority;
>
> 2) acting in good faith; and
>
> 3) performing discretionary, as opposed to ministerial acts.
>
> Under this test, no individual immunity exists for *ultra vires* activities.

420 Mich. at 633-34, 363 N.W.2d at 667-68.

The defendant commissioners are not "highest executive officials" entitled to absolute immunity against claims such as the ones here for malicious destruction of property. Therefore, as is the case with other lower level state officials, the commissioners are immune from tort liability under state law only if, among other things, the commissioners' acts giving rise to potential liability were com-

mitted in good faith. Plaintiffs allege that defendants acted with malice and an intent to ruin plaintiffs' business and to deprive them of property. If plaintiffs were to prove their allegations in state court, the requirement of good faith action would defeat the defendant commissioners' claim to individual immunity. We are, therefore, of the opinion that the individual defendants would not enjoy sovereign immunity if plaintiffs pursued the remedies afforded by state procedures. It may be that plaintiffs would not be entitled, under state law, to the same relief potentially available in an action brought under Civil Rights Act. Nevertheless, it has long been recognized that the fact that state procedures would not afford relief identical to that sought in the civil rights action does not make those procedures constitutionally inadequate. *Parratt* v. *Taylor*, 451 U.S. at 544; *Hudson* v. *Palmer*, 104 S.Ct. at 3204.

In short, Michigan law presents a variety of procedures to redress the wrongs that plaintiffs assert. Not only could plaintiffs have taken an appeal from the regulatory proceedings before the Public Service Commission, but they could have brought a state law action in tort or restitution, not to mention seeking one of the different extraordinary writs available to force the commissioners to cease intentionally acting outside their authority. Plaintiffs failed to show that these available procedures did not afford the process that is due under the fourteenth amendment.

*V.*

The District Court did not deal specifically with plaintiffs' equal protection claim brought under § 1985(3). Nevertheless, it appears clearly from the record that this claim will not lie, and we affirm the dismissal of the claim.

Plaintiffs allege that defendants denied them equal protection by classifying all telephone companies operating in Michigan according to size and then intentionally discrimi-

nating against the small telephone companies. In *Browder* v. *Tipton*, 630 F.2d 1149 (6th Cir. 1980), this Court held that the "equal protection of the laws" language of § 1985(3) protected only the "so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherently personal characteristics." 630 F.2d at 1150. Additionally, "[s]ection 1985(3) clearly does not reach all torts or equal protection violations measured by the rationality test." 630 F.2d at 1159. Small telephone companies are not members of a discrete and insular minority of the sort that has traditionally received special protection under the suspect classification analysis of the fourteenth amendment. We therefore conclude that plaintiffs' § 1985(3) claims do not state a claim upon which relief can be granted.[3]

*VI.*

Accordingly, we affirm the District Court's dismissal of all claims involved in this action.

---

[3] At oral argument, plaintiffs' counsel maintained that the equal protection claim was brought under § 1985(3) only. We therefore need not consider whether the above holding would also apply to an equal protection claim asserted under § 1983. Likewise, we state no opinion on the District Court's dismissal of the claims on alternative grounds of abstention and comity.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, AND JUDGMENT**

(United States District Court —
Eastern District of Michigan —
Northern Division)

(Filed January 28, 1985)

(NATIONAL COMMUNICATIONS SYSTEMS, INC., A Michigan Corporation and VICTOR E. SHAPLEY, Plaintiffs, -vs- MICHIGAN PUBLIC SERVICE COMMISSION, a Commission of the State of Michigan; ERIC J. SCHNEIDEWIND, Chairman of the Michigan Public Service Commission; DANIEL DEMLOW, former Chairman of the Michigan Public Service Commission; ROBERT FISCHER, Director of the Michigan Public Service Commission; and GERALD IRWIN, Director of the Communications Division of the Michigan Public Service Commission, Defendants — NO: 84 CV 9240 BC)

At a session of said court, held in the Federal Building, Bay City, Michigan on the 28th day of January, 1985.

PRESENT: HONORABLE JAMES P. CHURCHILL,
United States District Judge.

On January 24, 1985, oral argument was heard on defendants' motion to dismiss.

IT IS ORDERED that the claims against the Michigan Public Service Commission and the individual defendants in their official capacities is DISMISSED as required by the Eleventh Amendment.

For reasons stated on the record in open court, IT IS ORDERED that the due process claims against the individual defendants in their individual capacities are DISMISSED as required by *Parratt* v *Taylor*, 451 U.S. 527 (1981); *Hudson* v *Palmer*, __ US __, 104 S.Ct. 3194 (1984), and *Lee* v

*Western Reserve Psychiatric Habilitation Center*, No. 83-3421 (6th Cir. 1984).

For reasons stated on the record in open court, IT IS ORDERED that all remaining claims are DISMISSED as required by *Burford* v *Sun Oil Co.*, 319 U.S. 315 (1943) and *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981).

IT IS SO ADJUDGED.

/s/ James P. Churchill
UNITED STATES DISTRICT JUDGE

C-1

**COMPLAINT**

(United States District Court —
Eastern District of Michigan —
Northern Division)

(Dated May 4, 1984)

(NATIONAL COMMUNICATIONS SYSTEMS, INC., a Michigan corporation; and VICTOR E. SHAPLEY, Plaintiffs, vs. MICHIGAN PUBLIC SERVICE COMMISSION, a Commission of the State of Michigan; ERIC J. SCHNEIDEWIND, Chairman of the Michigan Public Service Commission; DANIEL DEMLOW, former Chairman of the Michigan Public Service Commission; ROBERT FISCHER, Director of the Michigan Public Service Commission; and GERALD IRWIN, Director of the Communications Division of the Michigan Public Service Commission, Defendants — Civil Action No. _____)

NOW COME Plaintiffs in the above entitled matter, by and through their attorneys, Patterson, Gruber & Kennedy, and show unto this Honorable Court as follows:

1. Plaintiff National Communications Systems, Inc. is a corporation organized and existing under the laws of the State of Michigan with its principal place of business located in the County of Saginaw, State of Michigan. At all times material herein, said Plaintiff was the owner of two companies, Mesick Telephone Company and Northern Telephone Company, which provided telephone and related services to consumers in certain areas of northwestern Michigan.

2. Plaintiff Victor E. Shapley is an adult citizen of the United States with his residence located in the County of Saginaw, State of Michigan.

3. Defendant Michigan Public Service Commission is a public commission created by the Legislature of the State

of Michigan pursuant to the authority vested in the Legislature by the Constitution of the State of Michigan. Said Defendant, by virtue of 1939 PA 3, as amended, is charged with regulation and control of public utilities and other services affected with a public interest in the State of Michigan.

4. Defendants Daniel Demlow and Eric Schneidewind are adult citizens of the State of Michigan and, at all times material herein, were duly appointed and acting commissioners of the Michigan Public Service Commission.

5. Defendants Roger Fischer and Gerald H. Irwin are each adult citizens of the State of Michigan and, at all times material herein, employees and/or agents of the State of Michigan and members of the regulatory staff of the Michigan Public Service Commission. At all times material herein, Defendant Fischer was the Acting Director and Director of the Michigan Public Service Commission and Defendant Irwin was the Director of the Communications Division thereof.

6. This action arises under the Fourteenth Amendment to the Constitution of the United States, Section 1, and under the Civil Rights Act of 1871, particularly 42 U.S.C. § 1983.

7. This Court has jurisdiction of this cause under and by virtue of 28 U.S.C. § 1343(3).

8. At all times material herein, it was the responsibility and duty of Defendants, and each of them, to regulate and control public utilities and services affected with a public interest within the State of Michigan, including within the scope of such regulatory responsibility the duty to provide just and reasonable telephone rates which for the consumer are neither oppressive nor permissive of exhorbitant and speculative profits and which for the utility are sufficient to cover all reasonable costs of doing

business and a fair and reasonable return on the equity invested.

9. For the purpose of discharging its regulatory responsibility, the Michigan Public Service Commission, the commissioners thereof, and the employees of its staff, including Defendants herein, are accorded certain administrative powers and responsibilities, including but not limited to the following:

(a) the power and jurisdiction to regulate all rates, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of public utilities, including telephone companies, pursuant to MCLA 460.6; and

(b) the power to adopt such rules and procedures for the filing, investigation and hearing of petitions or applications to increase or decrease utility rates and charges as the Commission shall find necessary or appropriate to enable it to reach a decision with respect to petitions or applications within a period of 9 months from the filing thereof, pursuant to MCLA 460.6a(2).

10. Pursuant to the power vested in the Commission to adopt rules and procedures as aforesaid, certain rules were promulgated setting forth the practice and procedure applicable in proceedings before the Michigan Public Service Commission, said rules appearing as Rules 460.11 *et seq* of the 1979 Michigan Administrative Code.

11. On or about March 26, 1975, Plaintiff Victor E. Shapley entered into certain agreements with James R. Hoogesteger whereby Plaintiff National Communications Systems, Inc. was incorporated and acquired as a holding company all of the stock and assets of Mesick Telephone Company and Northern Telephone Company, which

were then and thereafter telephone companies furnishing service to communities in northeastern Michigan.

12. The condition of the telephone plant in service which National Communications Systems, Inc. acquired as aforesaid was such that a substantial investment in the facilities and equipment of the two companies was required in order to provide reasonable and satisfactory service to customers of the Mesick and Northern companies.

13. In light of the requirements then existing, National Communications Systems, Inc. undertook the planning, financing and construction of capital improvements first in the geographical area served by Northern Telephone Company and, later, in the geographical area served by Mesick Telephone Company.

14. On or about September 30, 1976, Northern Telephone Company, as the operating telephone company, filed in accordance with the rules and procedures of the Michigan Public Service Commission a request for approval of the borrowing of funds to finance telephone system improvements in its service area (MPSC Case No F-876), and, on or about February 2, 1977, Northern Telephone Company filed for approval of a rate increase to consumers totalling approximately $47,000 annually (MPSC Case No U-5338).

15. Notices of hearing on the aforesaid applications were thereafter issued in accordance with the rules and procedures of the Michigan Public Service Commission.

16. In considering the several applications filed by Northern Telephone Company, it was the duty of Defendants, and each of them, to conduct themselves in their official capacity so as not to subject, under color of any statute, rule, regulation, procedure, custom or usage, any citizen of the United States, including Plaintiffs herein, to the deprivation of any rights secured to them by

the Constitution of the United States, including the constitutional guarantees of due process of law and equal protection of the laws.

17. Defendants, and each of them, while acting in their official capacity, did subject or did cause Plaintiffs herein to be subjected under color of the statutes, rules, procedures, customs and usages pertaining to, promulgated by and applicable in the practice of the Michigan Public Service Commission to the deprivation of rights secured to them by the Fourteenth Amendment to the Constitution of the United States, in that:

(a) Contrary to law but under color of law, Defendants Demlow and Schneidewind did establish and effectuate through the power and authority vested in them as commissioners of the Michigan Public Service Commission a policy of destroying by overbearing and unlawful regulation small telephone companies, including but not limited to the telephone companies operated by Plaintiff National Communications Systems, Inc.;

(b) Contrary to law but under color of law, Defendant Michigan Public Service Commission, through the instrumentality of its staff, did intentionally cause the regulatory powers vested in the Commission to be used for the purpose of destroying the business and assets of Plaintiffs herein, contrary to law and in knowing disregard of the public interest; and

(c) Contrary to law but under color of law, Defendants Fischer and Irwin did intentionally cause the rules and procedures of the Commission staff not to be used for the purpose of lawful regulation, but rather for the purpose of destroying the business and assets of Plaintiffs herein and of confiscating the property of Plaintiffs for an unlawful purpose.

18. The acts undertaken by Defendants herein to effectuate, under color of law, their purpose to destroy small telephone companies in general and the companies owned and operated by National Communications Systems, Inc. in particular include by way of illustration the following:

(a) Defendants did intentionally cause the applications filed by Northern Telephone Company and subsequent applications filed by Mesick Telephone Company to be delayed, without regulatory justification, for unreasonable lengths of time;

(b) Defendants did intentionally cause the recommendations concerning calculation of the rate base of Plaintiffs' operating companies, made by an assigned, experienced and qualified auditor of the Commission staff to be rejected without cause in fact and, upon refusal of the staff member to cooperate in making fictitious adjustments in his calculations, did cause the said staff employee to be removed from his assignment to the rate case and subsequently discharged from his employment;

(c) Defendants did intentionally cause the expert resources of the Commission staff to be used for the purpose of destroying the Plaintiffs' telephone companies;

(d) Defendants did intentionally cause the costs and expenses incurred by Plaintiffs in the regulatory proceeding to be unjustifiably increased (to an amount in excess of $200,000) for the purpose of destroying the ability of Plaintiffs to provide reasonable telephone service to its customers;

(e) Defendants did intentionally undertake to directly solicit public criticism and complaints concerning the operating telephone companies;

(f) Defendants, through their agents, did intentionally cause the disruption of telephone service to customers of the aforesaid telephone companies; and

(g) Defendants, having nominated and approved an independent appraiser to conduct an appraisal of the property and telephone plant of Plaintiffs' operating companies, did harrass said appraisers and did solicit, without cause or justification, the appraisal company's cooperation for the purpose of substantially understating the value of the telephone plant in service.

19. The policy and conduct of Defendants as hereinabove set forth was intended for the purpose of and did in fact result in a deprivation to Plaintiffs of rights secured to each by the Fourteenth Amendment of the Constitution of the United States, and specifically:

(a) the right of Plaintiffs to due process of law based on fair and equitable application of the statutes, rules and procedures of the Commission, free from the unlawfully conceived and executed purpose of destroying the Plaintiffs' business;

(b) the right of Plaintiffs to equal protection of the laws, free from arbitrary, capricious and intentional discrimination in treatment based on unlawful criteria of classification, as hereinabove described.

20. The defendants did each and severally combine and conspire with each other and with other unnamed persons, under color of law, to deprive Plaintiffs of rights guaranteed to them by the Constitution and laws of the United States, contrary to 42 USCA § 1985(3).

21. The acts and omissions of Defendants as hereinabove set forth constitute a conspiracy for the pur-

pose of depriving directly or indirectly the Plaintiffs of the constitutionally guaranteed right of equal protection of the laws and due process of law and for the purpose of preventing duly constituted state authorities from securing to the Plaintiffs equal protection of the laws and due process of law, contrary to 42 USCA § 1985(3).

22. The defendants did combine and conspire as aforementioned and in furtherance of such conspiracy did conceal their wrongful conduct from the Plaintiffs, thereby depriving them of their property and/or the exercise of their rights and privileges, contrary to 42 USCA § 1985(3).

23. The acts and omissions of Defendants as hereinabove set forth were, in each instance, a proximate cause of damages to Plaintiffs herein; that said damages include but are not limited to loss of income and net profits to Plaintiff National Communications Systems, Inc.; the forced sale by National Communications Systems, Inc. through receivorship proceedings of the assets and stock of its operating telephone companies on or about November 10, 1982; losses incurred or to be incurred (as a result of guarantees and obligations personally undertaken by said Plaintiff for and on behalf of National Communications Systems, Inc. and its operating companies) by Plaintiff Victor E. Shapley by reason of the unlawful conduct of Defendants herein; and irreparable damage to the business reputation of Plaintiff Victor E. Shapley; that all said injuries and damages are permanent and/or will last into the indefinite future; and that all said injuries and damages were proximately caused by the wrongful conduct of Defendants as hereinabove set forth.

WHEREFORE, Plaintiffs pray for such damages as appear to be fair and just at the time of trial of this

cause, said damages being in the amount of Five Million ($5,000,000.00) Dollars.

PATTERSON, GRUBER & KENNEDY

BY: BRIAN M. KENNEDY (P24339)
Attorney for Plaintiffs
817 Washington Avenue
P.O. Box 855
Bay City, Michigan 48707
(517) 892-3597

Dated: May 4, 1984